Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1494

In the Supreme Court of the United States

OCTOBER TERM, 1979

KENNETH CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-39a) is reported at 613 F.2d 391.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1979 (Pet. App. 1a-2a). A petition for rehearing was denied on February 27, 1980 (Pet. App. 40a). The petition for a writ of certiorari was filed on March 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether principles of collateral estoppel barred petitioner's retrial on charges of importing or aiding and abetting the importation of heroin following his acquittal on charges of conspiracy to import heroin.

2. Whether there was sufficient evidence of a conspiracy to warrant admitting statements of a co-conspirator at petitioner's second trial.

3. Whether the district court's supplemental charge to the jury on aiding and abetting was improper.

4. Whether the summation of the prosecutor constituted prejudicial error.

STATEMENT

In September 1978, petitioner and 12 others were tried in the United States District Court for the Eastern District of New York on a ten count indictment. The indictment named petitioner, Charles Praetorius, and 16 others as participants in an extensive conspiracy to import heroin into the United States from Bangkok, Thailand, and also charged them with committing various substantive drug offenses.[1] Petitioner was charged with conspiring to import and distribute large quantities of heroin from

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[1] Praetorius was charged in Count I under 21 U.S.C. 848 with organizing and managing a continuing series of violations of the federal narcotics laws. All 18 defendants were charged in Count II with conspiracy. Six of the remaining counts charged various defendants with importing or aiding and abetting the importation of heroin into the United States.

September 1976 to March 1978, in violation of 21 U.S.C. 841(a)(1), and with two counts of importing heroin, in July and September 1977, in violation of 21 U.S.C. 952(a) and 960(a)(1) and 18 U.S.C. 2. The jury acquitted petitioner of the conspiracy count but failed to reach a verdict as to the two substantive counts (Pet. App. 7a-10a).[2] Petitioner was retried on these two counts and was convicted. He was sentenced to concurrent terms of four years' imprisonment on each count, a $10,000 fine, and a special parole term of five years (Pet. App. 5a n.1). The court of appeals affirmed (Pet. App. 3a-39a).

The government's case at the second trial, as at the first, centered around the testimony of co-conspirators Ralph Abruzzo and Glenston Page Laws, who were Charles Praetorius' leading subordinates in the organization and management of the heroin conspiracy.[3] The evidence showed that on July 6, 1977, petitioner, accompanied by Abruzzo, Praetorius, Laws, and Louis Juan departed New York

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[2] The jury convicted Charles and Diane Praetorius and Louis Juan on the conspiracy count, while acquitting Eric Romandi and Doris Jackson, as well as petitioner. In addition, the jury acquitted Charles Praetorius of the continuing criminal enterprise offense charged in Count I, but convicted him of one substantive count of distributing heroin. The jury failed to reach a verdict as to any of the defendants on any of the remaining counts (Pet. App. 9a-10a).

[3] Ralph Abruzzo was not charged in the original indictment. In connection with his cooperation agreement with the government, Abruzzo pled guilty to one count charging him with use of the telephone to facilitate the distribution of heroin, in violation of 21 U.S.C. 843(b) (Pet. App. 8a n.3).

for Bangkok, Thailand, arriving in Bangkok on July 8 (Pet. App. 8a, 11a; Tr. 44-47, 372-380).[4] Praetorius immediately contacted his Bangkok source and arranged for the purchase of two kilograms of heroin (Tr. 51-53). Praetorius and Abruzzo picked up the first kilogram that afternoon (Tr. 54-55) and, together with Laws, the second kilogram two days later (Pet. App. 11a-12a; Tr. 57, 59-61, 387-390). On July 12, petitioner and Juan departed Thailand with the heroin, which had been repackaged in ski bags and taped to their bodies (Tr. 61-66, 391-395). Praetorius, Abruzzo and Laws departed Bangkok two days later, the latter two carrying additional amounts of heroin (Pet. App. 12a). Once back in New York, Praetorius retrieved from petitioner and Juan the heroin they had carried into the United States, paying them each $41,000 for their service as couriers (*id.* at 12a-13a; Tr. 70-71, 396).

In late September 1977, petitioner again flew to Bangkok, accompanied by Abruzzo and two different co-defendants, to join Charles and Diane Praetorius (Tr. 81-84, 256-263). That same day Charles Praetorius collected two kilograms of heroin from his source; two days later Abruzzo and Diane Praetorius picked up another two kilograms (Pet. App. 15a-16a; Tr. 88-90, 91-97, 264-266). The heroin was again packed in ski bags and taped to the bodies of petitioner and other couriers, who returned with it to the United States (Pet. App. 16a; Tr. 97-104,

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[4] "Tr." refers to the transcript of petitioner's second trial.

269-280). As to this latter trip, Abruzzo testified that Praetorius had informed him that petitioner would be "going * * * for himself," meaning that petitioner was to purchase a kilogram of heroin himself, carry it back to the United States, and be paid for it by Praetorius at a rate of $4,000 per ounce (Tr. 76). Moreover, petitioner, who was paid $136,000 for his services as a courier, ultimately gave Abruzzo $10,000 as a "finder's fee" for allowing him to purchase heroin from Abruzzo's and Praetorius' "connection" in Thailand (Pet. App. 17a; Tr. 103-104, 107-111).

ARGUMENT

1. Petitioner contends (Pet. 17-21) that principles of collateral estoppel barred his retrial on the two substantive counts on which the jury was unable to reach a verdict at the first trial, because, in his view, the factual questions involved were already decided in his favor by the first jury in acquitting him of conspiracy. This contention is without merit.

We note at the outset a basic flaw in petitioner's contention. This is not the garden variety collateral estoppel claim in which a defendant, having been acquitted in a trial on one charge, seeks to bar prosecution on a different charge on the ground that a fact or facts essential to successful prosecution on the second charge had been resolved in his favor by the first acquittal. Here, the substantive importation charges were themselves litigated in the first trial, and at least some jurors were prepared to find petitioner guilty. Even if it could be said that the failure

to return a verdict on the substantive counts was inconsistent with the conspiracy acquittal, we believe no collateral estoppel effect can properly be given where the first jury heard the charges that are allegedly estopped and did not acquit. In any event, in the circumstances of this case the conspiracy acquittal does not factually support estoppel on the substantive charges.

The doctrine of collateral estoppel, as embodied in the Fifth Amendment guarantee against double jeopardy, generally precludes prosecution of an offense when an issue essential to a conviction has necessarily been determined in favor of the defendant at a previous trial. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). The doctrine is applicable, however, only when the defendant can show that the jury's verdict in the prior trial necessarily decided in his favor the issue he seeks to foreclose from further litigation. *United States* v. *Mespoulede*, 597 F.2d 329, 333 (2d Cir. 1979); *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977). The burden of making this showing is substantial "since it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict." *United States* v. *Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974). And the difficulty of making this showing is exacerbated when, as here, the acquittal in the previous criminal case is on a conspiracy charge. *Ibid.*, citing *United States* v. *Tramunti*, 500 F.2d 1334, 1346-1349 (2d Cir. 1974).

Thus, resolution of a claim of collateral estoppel depends upon an analysis of the particular facts adduced at successive trials. These factual considerations have been resolved against petitioner by both courts below, and no issue is presented here that warrants this Court's review. Moreover, the disposition below was plainly correct. As the district court found (A. 22a-23a),[5] although the evidence at the first trial that tended to support a finding of importation could also have implied that petitioner had become part of the Praetorius conspiracy, it did not make such an inference inevitable. Given the evidence at that trial that petitioner was carrying heroin "for himself," the first jury certainly could have concluded that petitioner had brought the drugs into the United States but had not entered into an agreement with Praetorius to import and distribute heroin.

Another plausible explanation for petitioner's acquittal of conspiracy at the first trial is that the jury may have found that several different conspiracies existed and that petitioner was not a member of the single conspiracy charged in the indictment. Such a conclusion would not have been unreasonable, given the evidence at that trial that there were several trips to Bangkok involving different participants, and given the court's instructions to the jury on the issue

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[5] "A." refers to the appendix filed on appeal by petitioner and co-defendant Eric Romandi.

of multiple conspiracies.[6] See *United States* v. *Gugliaro*, *supra*, 501 F.2d at 71. In these circumstances, the court of appeals correctly found (Pet. App. 25a-27a) that a rational jury could have acquitted petitioner of the charged conspiracy without deciding that he had not engaged in importation. See *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444.[7]

2. Petitioner also contends (Pet. 9-17) that statements by other participants in the importation were improperly admitted at the retrial since the first jury had acquitted him of conspiracy. This contention is without foundation.

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[6] The court instructed the jury (Pet. App. 23a):

> Now, the indictment charges a single conspiracy involving each one of the defendants. You must determine if the conspiracy charged existed between two or more conspirators. If you find that such a conspiracy existed, to find a defendant guilty, you must find that he or she was a member of the conspiracy charged. If a defendant was not a member of the conspiracy charged, you may not find that defendant guilty even though he or she may have been a member of another conspiracy. But if a defendant was a member of the conspiracy charged, that defendant is guilty even though he or she was also a member of some other conspiracy.

[7] Petitioner's reliance (Pet. 20-21) on *United States* v. *Mespoulede*, *supra*, is misplaced. That case involved nothing more than the determination, on an entirely different factual record, that the jury's acquittal of the defendant on a charge that he possessed cocaine on a specific day foreclosed the government from attempting to prove that same possession in a later conspiracy trial. *Mespoulede* did not apply any legal standard different from that followed in this case, however, and in fact served as a guide for the decision below (see Pet. App. 22a, 26a-27a).

Petitioner's acquittal of conspiracy at his first trial constituted a finding by the jury that the government had failed to prove petitioner's guilt on that charge beyond a reasonable doubt. However, to warrant the admission into evidence of statements by co-conspirators under Fed. R. Evid. 801(d)(2)(E), the government is not required to establish participation in the conspiracy beyond a reasonable doubt. The government must show that the statements were made by a joint venturer or participant in the conspiracy, but this showing may be made by a quantum of independent evidence less than that required to convict. See, *e.g.*, *United States* v. *Mangan*, 575 F.2d 32, 42-43 (2d Cir.), cert. denied, 439 U.S. 931 (1978); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).[8] Indeed, so-called co-conspirator statements may be admissible even if a conspiracy has not been charged. See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 26-27 (1974); 4 *Weinstein's Evidence* ¶ 801(d)(2)(E)[01]

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[8] Petitioner correctly observes (Pet. 10-12) that the courts of appeals have not agreed on the formulation of the standard to be applied in determining whether the independent evidence of a defendant's participation in a conspiracy is sufficient to warrant admission of co-conspirator statements against him. See, *e.g.*, *United States* v. *James*, 590 F.2d 575, 581 & n.4 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979) ("substantial independent evidence"); *United States* v. *Santiago*, 582 F.2d 1128, 1133-1135 (7th Cir. 1978) ("preponderance"). But it seems likely that these variations in phrasing will seldom, if ever, produce different results. In this case, the independent proof of participation was sufficient under any of these tests, and there is no need to decide here which of the various formulations is most appropriate.

(1979). And because of the difference in standards, co-conspirator statements may be admissible even when a conspiracy count has been dismissed by the court, *United States* v. *Stanchich*, 550 F.2d 1294, 1299 (2d Cir. 1977), or when the declarant has been acquitted of conspiracy, *United States* v. *Cravero*, 545 F.2d 406, 419 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977). Whether or not there has been an acquittal, the test remains whether independent evidence establishes participation by the declarant and the defendant in a joint venture or a conspiracy.[9] The court of appeals' finding that there was sufficient evidence to meet this standard does not merit further review.[10]

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[9] *United States* v. *Lucido*, 486 F.2d 868 (6th Cir. 1973), on which petitioner relies (Pet. 13-14, 17), is not to the contrary. In *Lucido*, the government introduced co-conspirator statements against a defendant charged with conspiracy and two substantive counts. The defendant was convicted on one of the substantive counts but acquitted of conspiracy. On appeal, the court held that the use of co-conspirator declarations to establish the substantive charge against the defendant was reversible error on the facts of that case. The court stated (486 F.2d at 869):

> [The rule permitting introduction of statements by co-conspirators] is applicable only in situations where independent evidence establishes *prima facie* an illegal joint venture. * * * No such independent evidence exists in this case.

The rule stated is the same as that applied by the court below. Here, however, sufficient independent evidence of a conspiracy did exist, which warranted the admission of the co-conspirator declarations.

[10] Again, as with petitioner's more general collateral estoppel claim (see pages 7-8, *supra*), we note that the acquittal

3. Petitioner also contends (Pet. 22-28) that the district court's supplemental charge to the jury on aiding and abetting constituted reversible error. This contention is without merit.

Shortly after the jury received the case for deliberation, it requested the court to repeat its instructions on aiding and abetting (Tr. 686), and the court did so. The following day, the jury requested that certain testimony and the entire instructions be repeated (Tr. 697-698), and the court complied with the request. Shortly thereafter, the jury requested that certain other testimony be repeated (Tr. 728). Later that afternoon, the jury sent the court the following note (Pet. App. 30a):

> If a person went somewhere with the intention of participation—is that aiding and abetting? Can we have aiding and abetting expanded upon.

The court drafted supplemental instructions and, after submitting them to counsel, instructed the jury that "[t]he mere going of a person somewhere with the intention of participation would not in and of itself be aiding and abetting" (Tr. 744). The court then repeated its prior charge as to the elements of the substantive offense of importation, and reread the instructions it had given the jury earlier that day as to the elements of aiding and abetting (Tr.

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was not necessarily a finding by the first jury that petitioner had not participated in any conspiracy, but simply a finding that the government had failed to establish beyond a reasonable doubt his participation in the particular conspiracy charged.

744-746). Over objections by defense counsel, the court then expanded on its instructions by using examples of conduct derived from the testimony at trial (Tr. 746-747; Pet. App. 31a):

> Now, what you have to do is apply those instructions to the facts of this case. That means, for example, that if you find beyond a reasonable doubt that a defendant flattened out any of the plastic bags into which the heroin was packaged, or that he broke up the vials in which the heroin was packaged for the purpose of disposing of them, or handed the scissors or the plastic bags to others during the packaging process, or he undressed himself and permitted himself to be taped in the presence of others, thereafter in the presence of others departing the hotel room taped with the heroin. Those acts—and I'm just giving you those examples. If you found them beyond a reasonable doubt to have been performed, would be aiding and abetting. But remember now what I told you that they would have to be done with the requisite intention and knowledge and willfulness as I have charged it to you.
>
> All right, I hope that will be helpful to you. Will you go and continue your deliberations please?[11]

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[11] Petitioner's claim (Pet. 25-26) that the trial judge distorted the evidence by telling the jury that either petitioner or co-defendant Romandi had handed the scissors to others during the heroin packaging process is spurious. The judge merely instructed the jury that, *if* they found beyond a reasonable doubt that a defendant handed the scissors or the plastic bags to others during the packaging process, such act would constitute aiding and abetting. Moreover, the possi-

These instructions did not constitute error. In a trial by jury in federal court, the presiding judge has a responsibility to direct and assist the jury in its duty of applying the law to the facts of the case. *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). In charging the jury, the judge is not limited to instructions of an abstract sort but may specifically refer to the evidence. Indeed, the judge may go well beyond what the trial court did here; he may comment on the evidence, direct the jury's attention to certain pieces of evidence, and express his opinion upon the facts, provided that he clearly informs the jury that it is the final arbiter of the facts. *Ibid.* Moreover, when a jury makes explicit its difficulties in applying the law to the facts of the case, the trial judge is under an obligation to give supplemental instructions to dispel the confusion. See *Bollenbach* v. *United States*, 326 U.S. 607, 612-613 (1946). He is not bound by standard instructions, but should supplement such instructions as necessary. See, *e.g.*, *United States* v. *Bolden*, 514 F.2d 1301, 1308-1309 (D.C. Cir. 1975).

The jury in the instant case clearly indicated that it wanted something more than the bare recitation of the law it had already heard three times. The

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bility that petitioner did handle the scissors was raised by the government's evidence. On direct examination, unindicted co-conspirator Kenneth Pollitt testified (Tr. 274-275) that during the September trip to Bangkok, "[petitioner] and myself, I don't believe we took any active role, just being present, maybe handing the plastic bag or scissors to Charlie [Praetorius]."

judge, in giving the jury examples based on the evidence, expressed no opinion on the credibility of the witnesses or other evidence. Moreover, he expressly cautioned the jury that the explanation was given in terms of examples. In these circumstances the court of appeals correctly found (Pet. App. 32a) that the instructions were proper and "went no farther than the need indicated in the jury's request."

4. Petitioner's final contention (Pet. 28-33), that the prosecutor improperly vouched for the credibility of government witnesses in his closing argument to the jury, is insubstantial. Petitioner's defense centered on the credibility of the government's witnesses. Defense counsel extensively attacked the witnesses' character, credibility, and respective agreements to cooperate with the government (Pet. App. 18a), and argued to the jury in closing argument that the government's case was based on lies—"[l]ittle lies, big lies, bigger lies" (Tr. 610).

Responding to these allegations in his closing argument, the prosecutor invited the jury to examine the evidence, stating, *inter alia* (Tr. 659):

> * * * I submit to you, ladies and gentlemen, that that evidence is credible. It is believable. It is supported by the known facts in the case.

It is well established that the prosecutor may not interject his own personal knowledge or credibility nor vouch for the credibility of witnesses on facts not disclosed in the record. See, *e.g.*, *Berger* v. *United States*, 295 U.S. 78, 88 (1935). But this rule was not violated here. As the court below stated (Pet.

App. 34a), "[w]here a substantial portion of the defense summation is devoted to attacks upon government witnesses, with stress on their cooperation, the prosecutor is entitled to make an appropriate response." See, *e.g.*, *United States* v. *Ivey*, 550 F.2d 243 (5th Cir.), cert. denied, 431 U.S. 943 (1977); *United States* v. *Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976); *United States* v. *Crouch*, 528 F.2d 625, 633 (7th Cir.), cert. denied, 429 U.S. 900 (1976). Here, the prosecutor simply responded to defense attacks on the credibility of the government's witnesses by arguing that the witnesses' credibility was supported by the record. He did not assert any personal knowledge of their credibility or suggest any extra-record support for the government's testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

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